No. 83-585

In the Supreme Court of the United States

OCTOBER TERM, 1983

REX C. CAUBLE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

DAVID B. SMITH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the trial court's instruction on the "enterprise" element of the racketeering counts constituted plain error.

2. Whether the judgment of criminal forfeiture in this case was broader in scope than that permitted under 18 U.S.C. 1963(a) or in violation of petitioner's constitutional rights.

3. Whether the evidence was sufficient to sustain petitioner's conviction on a charge of conducting an enterprise "through" a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c).

4. Whether the forfeiture judgment violated the due process rights of the limited partners of Cauble Enterprises, the racketeering enterprise charged in the indictment.

5. Whether petitioner's conduct constituted misapplication of bank funds within the definition of 18 U.S.C. 656.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 706 F.2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1983. A petition for rehearing was denied on August 11, 1983. The petition for a writ of certiorari was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of operating Cauble Enterprises,[1] a Texas limited partnership, through a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c); investing the proceeds of racketeering activity in a legitimate interstate business enterprise, in violation of 18 U.S.C. 1962(a); conspiracy to violate the Racketeer Influenced and Corrupt Organizations statute, in violation of 18 U.S.C. 1962(d); three counts of violating the Travel Act, 18 U.S.C. 1952(a); and four counts of misapplication of bank funds, in violation of 18 U.S.C. 656. The jury also returned a special verdict forfeiting petitioner's interest in Cauble Enterprises, the racketeering enterprise charged in the indictment. Petitioner was sentenced to ten concurrent terms of five years' imprisonment. The court also entered a judgment of criminal forfeiture in accordance with the jury's verdict. The court of appeals affirmed (Pet. App. 1a-58a).

The evidence at trial, which is partially summarized by the court of appeals (Pet. App. 14a-23a), showed that petitioner, a multi-millionaire Texas businessman, was in effect "the range boss of the highly publicized 'Cowboy Mafia'," a loosely-knit group

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[1] Petitioner Rex C. Cauble was the general partner of Cauble Enterprises. Petitioner's wife and adopted son are the limited partners. Petitioner's share of the partnership was approximately 31%.

[2] The exploits of the "Cowboy Mafia" are chronicled in more detail in several earlier decisions of the court of appeals. See *United States* v. *Ruppel*, 666 F.2d 261 (5th Cir.), cert. denied, 458 U.S. 1107 (1982); *United States* v. *Hamm*, 659 F.2d 624

responsible for importing and distributing over 147,000 pounds of marijuana from 1976 through 1978" (*id.* at 2a). A final boatload of 44,000 pounds of marijuana was seized by DEA agents at Port Arthur, Texas, on November 29, 1978, and thus was never distributed. Several employees of Cauble Enterprises were arrested on the boat (*id.* at 21a-22a; 9 Tr. 1095-1099, 1101; 11 Tr. 1674-1676; 13 Tr. 2121-2122). "The issue, as both trial counsel repeatedly stressed to the jury, was whether Cauble knew of the smuggling activities; no one contested that the smugglers used many of Cauble Enterprises' assets" (Pet. App. 15a).

Petitioner caused Cauble Enterprises and banks controlled by Cauble Enterprises to make numerous unsecured loans to one Charles "Muscles" Foster, a trusted ranch foreman who acted as petitioner's dupe in the drug smuggling ventures.[3] The loans to Foster totalled over $200,000 in 1977 and 1978. These loans were made in a highly irregular manner. The loan money was used to prepare for and facilitate the drug smuggling activities in various ways (*id.* at 15a-16a; 7 Tr. 523, 526-527, 547-564, 577-581, 626-637, 643-644, 652; 8 Tr. 679-686; 9 Tr. 1012, 1070-1071, 1194-1196; 12 Tr. 1949-1951; 13 Tr. 2151-2155; GX 1, 25, 33, 42, 45). Petitioner placed Cauble Enterprises' private aircraft and pilots at the disposal of

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(5th Cir. 1981) (*en banc*); *United States* v. *Hawkins*, 658 F.2d 279 (5th Cir. 1981).

[3] Foster was shown to be mentally unstable and devoted to Cauble like a son. Although he played a key role in the conspiracy, he had been acquitted by reason of insanity (8 Tr. 698-699, 702-710, 713-718, 721-723, 726-729, 735-736, 752, 773, 776-778; 9 Tr. 981-984, 1088-1090; 11 Tr. 1674-1675; 13 Tr. 2045, 2048).

the smugglers. They flew the aircraft on numerous trips throughout Texas and the South in furtherance of their scheme (Pet. App. 16a-21a). Petitioner himself flew to Las Vegas on September 12, 1977, with two of the principal smugglers in order to launder drug money at a casino (*id.* at 18a; 6 Tr. 378-382; 9 Tr. 1039-1040, 1184, 1214-1218; 10 Tr. 1316; 12 Tr. 1899; DX3).[4] The smugglers used a number of ranches owned by Cauble Enterprises to store and distribute the loads of marijana (Pet. App. 16a-21a). They also used a Houston apartment leased by Cutter Bill's Western Wear, a retail clothing business owned by Cauble Enterprises, as a rendezvous point while waiting for two of the marijuana boatloads to arrive (*id.* at 19a-21a). In addition, petitioner used two banks controlled by Cauble Enterprises to deposit cash drug proceeds without complying with the currency transaction reporting requirements of the Bank Secrecy Act, 31 U.S.C. 1081 and 1058.[5] Finally, peti-

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[4] Petitioner flew to Las Vegas again on May 4, 1978, to launder more money for the smugglers (Pet. App. 18a-19a). Petitioner also used Cauble Enterprises' money to pay for numerous flights by Foster aboard commercial airlines in furtherance of the smuggling scheme.

[5] At Western State Bank of Denton, Texas, Cauble Enterprises, Foster and another major smuggler named Raymond Hawkins were improperly placed on a list of people and businesses exempt from the normal requirement that deposits of more than $10,000 in cash be reported to the Treasury for use by law enforcement authorities. Foster was also improperly placed on the exempt list at South Main Bank of Houston (Pet. App. 22a-23a; 7 Tr. 456, 572-575; 8 Tr. 683; 10 Tr. 1365-1376, 1380-1381, 1386-1388; 13 Tr. 2112-2113, 2121).

Petitioner was thwarted in his attempt to use a third bank, in which Cauble Enterprises owned 20% of the stock, to launder $260,000 in drug proceeds (Pet. App. 22a).

tioner employed several of the professional or management personnel of Cauble Enterprises to carry out various tasks in furtherance of the smuggling scheme. In an attempt to hide his drug profits, petitioner directed Cauble Enterprises' bookkeeper, Carolyn McConnell, to falsify bank deposit slips subpoenaed by a grand jury so as to indicate a legitimate source for the cash income (Pet. App. 23a n.55; 8 Tr. 813-817, 833, 871, 877-887, 897-898, 906; 9 Tr. 931-947, 961-962, 972-980, 1015-1025, 1198-1199; 10 Tr. 1222; 13 Tr. 2068-2069, 2081-2088). One of Cauble Enterprises' lawyers, Robert Parker, assisted Foster in leasing a suitable island site on the Intracoastal Waterway at which to unload the marijuana (11 Tr. 1504-1510, 1515-1516, 1523-1524, 1533, 1538, 1540-1541, 1545-1550, 1553-1555, 1576-1577). Another Cauble Enterprises' bookkeeper, Elliott Black, managed the bank account of James Thompson Seafood, a phony front company set up for the purpose of disguising the marijuana smuggling operation (7 Tr. 626-637, 643-644; 8 Tr. 681-686; 13 Tr. 2151-2155; GX 25, 33).

Apart from the evidence showing how petitioner used Cauble Enterprises' assets and personnel in furtherance of the smuggling scheme, there was direct testimony that petitioner knew of and participated in the scheme. Most of this evidence is detailed in the opinion of the court of appeals (Pet. App. 16a-22a).

ARGUMENT

1. Petitioner contends (Pet. 8-10) that the district court committed plain error in charging the jury on the enterprise element of the racketeering counts. He argues that the court's instructions failed to make clear that the government was required to prove beyond a reasonable doubt that Cauble Enterprises was the RICO enterprise whose affairs were conducted through a pattern of racketeering activity. According to petitioner, the court's instructions amounted to a directed verdict of guilt on the enterprise element.

This claim is meritless. In a RICO case involving a legitimate business enterprise, as opposed to an illegal association-in-fact of the type involved in *United States* v. *Turkette*, 452 U.S. 576 (1981), it is difficult to imagine how a jury question could be presented concerning the existence of the enterprise. Here, there was certainly no dispute about the existence of Cauble Enterprises. Thus, it would not have been erroneous to omit any instruction on the enterprise element in this case.

Moreover, as the court of appeals noted (Pet. App. 32a-33a), the trial judge did draw a clear distinction between Cauble Enterprises and the RICO enterprise in instructing the jury about the elements of the RICO counts. "The judge told the jurors that the enterprise *charged* was Cauble Enterprises; he never told them that the RICO enterprise *was* Cauble Enterprises" (*id.* at 33a; emphasis in original). The charge on each RICO count included the enterprise element, and the judge prefaced his instructions with the admonition that the government must prove each of the elements beyond a reasonable doubt (*id.* at 32a). We note that petitioner, who was represented

by four expert trial lawyers, made no objection to any part of the court's jury instructions.[6]

2. Petitioner next raises a welter of objections (Pet. 10-15) to the scope of the criminal forfeiture judgment in this case and to the manner in which the forfeiture question was presented to the jury. Each of these arguments lacks merit.

Petitioner contrasts traditional civil *in rem* forfeitures with criminal *in personam* forfeitures and suggests that the latter are somehow unfair.[7] But a defendant in a criminal forfeiture case has all of the protections that apply to any other criminal case. The owner of property subject to civil *in rem* forfeiture has far fewer substantive and procedural rights. The government typically needs to show only probable cause to believe the property is subject to forfeiture. The burden then shifts to the claimant-owner to show, by a preponderance of the evidence, that the property is not forfeitable. 19 U.S.C. 1615. And in civil *in rem* forfeitures the property of a wholly innocent owner may be forfeited. *Calero-*

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[6] Petitioner's statement (Pet. 8) that "proof of the enterprise element coalesced with that of the 'pattern of racketeering activity' conducted by the 'Cowboy Mafia'" is without meaning. The enterprise pleaded and proved was Cauble Enterprises. The pattern of racketeering activity was the drug smuggling activities of the "Cowboy Mafia." In contrast to the *Turkette* situation involving an illegitimate association-in-fact, the enterprise element here was totally distinct from the pattern of racketeering activity.

[7] Petitioner raised no constitutional issue regarding the forfeiture in the courts below, except for the argument that it violated the due process rights of the limited partners. We treat that argument below. His new constitutional claims are thus not properly presented for review by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). By contrast, criminal forfeiture under RICO requires that a defendant be found guilty beyond a reasonable doubt of one of the most serious federal criminal offenses and that the jury further find, again beyond a reasonable doubt, that the property in question is so related to the RICO offense that it is subject to forfeiture under the statute. It is farfetched to claim that these procedures are constitutionally defective, particularly by comparison with those applicable to a civil *in rem* proceeding.

Petitioner's suggestion that RICO permits "forfeiture of estate" in contravention of Article III, § 3, Cl. 2 of the Constitution has been rejected by every court that has considered the issue. *E.g.*, *United States* v. *Grande*, 620 F.2d 1026, 1037-1039 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *United States* v. *Huber*, 603 F.2d 387, 396 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *L'Hoste*, 609 F.2d 796, 813 n.15 (5th Cir.), rehearing denied, 615 F.2d 383, cert. denied, 449 U.S. 833 (1980).

The common law doctrine of forfeiture of estate or "corruption of the blood" required surrender of the defendant's estate and chattels upon conviction of treason and certain other felonies. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 682. By contrast, as the Senate Committee on the Judiciary noted in explaining Section 1963, "the concept of forfeiture as a criminal penalty [is] limited * * * in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and [does] not extend[] to any other property of the convicted offender * * *." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969). The Committee emphasized that the purpose of the forfeiture statute

was to divest persons engaged in criminal activities of their interests in organizations acquired or operated through racketeering methods. *Id.* at 79-80; *see Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 10-12. The unusually extensive forfeiture in this case is the result of petitioner's deliberate decision to use Cauble Enterprises to further the illegal scheme.[8]

Petitioner incorrectly suggests that certain business assets were included in the RICO enterprise merely because he owned them. The government sought and obtained forfeiture of only one thing—petitioner's interest in the partnership. Petitioner admitted at trial, on direct examination, that all of his property was a part of Cauble Enterprises (Pet. App. 43a-44a, n.100).

Petitioner also suggests (Pet. 14) that the forfeiture here was "all out of proportion to" his guilt.[9] In fact, the forfeiture of petitioner's interest in Cauble Enterprises is a suitable punishment for his crimes. Petitioner masterminded the largest drug smuggling operation ever uncovered in the state of Texas. As the statement of facts shows, the smuggling operation was facilitated at every step by the many human, physical, and financial assets of Cauble Enterprises. The whole purpose of the RICO statute is to prevent such business enterprises from being corrupted and used for criminal ends. Petitioner received the severe punishment mandated by Congress.[10]

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[8] Petitioner has hardly been pauperized by the forfeiture judgment. His wife and son, who are dependent upon him, remain immensely wealthy.

[9] No such argument was made below.

[10] We note that petitioner received only a five-year prison term. Other conspirators in the same smuggling operation received as much as twenty years' imprisonment.

See *United States* v. *Tunnell*, 667 F.2d 1182 (5th Cir. 1982); *United States* v. *Grande*, *supra*, 620 F.2d at 1039; see, generally, *Russello* v. *United States*, *supra*.

Petitioner's claim (Pet. 15) that RICO allows forfeiture only of racketeering profits is obviously incorrect. Indeed, the issue before this Court in *Russello* v. *United States*, *supra*, was whether racketeering profits may be forfeited. This Court held that they may be. No one has ever doubted that the defendant's interest in the racketeering enterprise itself may be forfeited, whether or not it is illegally acquired. That is all that was forfeited here.

Petitioner also argues that certain assets owned by Cauble Enterprises had no direct connection with the smuggling episodes and therefore are not subject to forfeiture. However, as the court of appeals correctly pointed out (Pet. App. 44a-45a), petitioner's argument misperceives the difference between an *in personam* RICO forfeiture based on the enterprise concept and a traditional *in rem* forfeiture aimed at the physical instrumentalities of crime. Each asset of Cauble Enterprises need not be "tainted" by use in connection with the racketeering activity. It suffices that the asset is part of the defendant's interest in the enterprise.[11]

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[11] Petitioners' reliance upon *United States* v. *Zang*, 703 F.2d 1186 (10th Cir. 1982), is misplaced. The question there was whether the investment of racketeering proceeds in a legitimate business, in violation of 18 U.S.C. 1962(a), permits the forfeiture of the defendant's entire interest in the business or merely the invested racketeering proceeds. The court of appeals remanded the case for the district court to determine whether "untainted interests" existed in the enterprise and to protect the "interests of innocent third parties." 703 F.2d at 1195. The court of appeals' opinion is somewhat ambiguous. But if the court meant to hold that only the invested racketeering proceeds were subject to forfeiture, that would clearly be

Petitioner makes the related argument that the jury should have been given a choice of which assets it wished to forfeit rather than a special verdict form with only two options: the forfeiture of all of petitioner's interest in the enterprise or nothing. But petitioner did not object to the all or nothing choice given the jury, and he must therefore rely upon the plain error doctrine. For the reasons stated by the court of appeals (Pet. App. 44a-45a), there was no error at all in the procedure used here. There was no factual or legal basis for the jurors to make distinctions between different assets, as petitioner suggests they should have been permitted to do. It is untenable to argue, as petitioner does, that certain assets might be found to afford a source of influence over the criminal enterprise whereas other equally valuable assets might not.

3. Petitioner next urges (Pet. 15-18) this Court to provide guidance to the lower courts on the question of what nexus must be proved between the RICO defendant, his racketeering acts and the enterprise in order to sustain a finding of guilt under Section 1962(c). While that question has received a good deal of attention by the lower courts, and the tests they have devised may not be identical, there is no reason for this Court to review the question in this

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incorrect since the defendants' original interest in the business was "maintained" with the racketeering funds. See Section 1963(a).

In any event, *Zang* merely involves a forfeiture for violation of Section 1962(a). Because petitioner's interest in Cauble Enterprises was forfeited for violations of Section 1962(c) and (d) as well as Section 1962(a), *Zang* could not aid him.

case because petitioner stands properly convicted of the Section 1962(c) charge under any test.[12]

Petitioner contends that the evidence at trial was insufficient to meet the nexus test established by the court of appeals here. Petitioner is wrong and, in any event, there is no need for this Court to review a challenge to the sufficiency of the evidence. The government showed that approximately $900,000 in unexplained cash was deposited into Cauble Enterprises' Special Account at Western State Bank of Denton in 1977 and 1978, the years when the marijuana importations occurred. The evidence demonstrated that this cash was a part of petitioner's share of the proceeds from the smuggling operation. Petitioner's statement (Pet. 18) that he proved at trial that the cash deposits were derived from cattle sales and gambling is flatly contradicted by the record.[13]

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[12] Petitioner does not contend that he would fare better under any of the other tests articulated by the lower courts, which are less demanding than the one formulated by the court below in this case. See Pet. App. 8a-10a, 27a, and cases cited therein.

[13] Petitioner testified that $165,000 in cash deposits represented money he won on a trip to Las Vegas. The only corroboration he offered was four cash deposit slips adding up to $165,000 with handwritten notations that the cash was won in Las Vegas. However, the government established that the handwritten notations had been added to the deposit slips after they were subpoenaed by the grand jury (Pet. App. 23a n.55; 8 Tr. 898-901; GX 20).

Petitioner presented virtually no evidence in support of his attorneys' argument that the remainder of the cash deposits represented unrecorded cattle sales for cash. By contrast, the government presented irrefutable proof, covering several hundred pages of testimony, that there were no cash cattle sales. The deposit slips with notations indicating cash cattle

Petitioner also ignores the fact that the court of appeals held (Pet. App. 10a n.24) that "if the defendant exercised such control over the legal enterprise as to make his acts the acts of the enterprise, proof of the defendant's commission of racketeering acts satisfies both nexuses. In that event the defendant's connection with the racketeering acts is also the enterprise's connection." It was undisputed at trial that petitioner exercised total control over Cauble Enterprises and that he was actively involved in the details of its operations (8 Tr. 782-785, 798, 808, 826, 861-863, 866-868; 13 Tr. 2049-2050, 2097, 2114-2116).

4. Petitioner contends (Pet. 20) that the court of appeals erred in holding that a district court has no discretion under Section 1963(c) "to establish the terms and conditions of forfeiture and to protect the interests of innocent third parties." Petitioner has seen fit to interpret the court of appeals' holding in a diametrically opposite fashion in litigation that is continuing in the Texas district court. Petitioner, now joined by the limited partners (whom he in reality controls), contends in the district court that, according to the terms of the limited partnership agreement, the partnership may not be dissolved until the year 2002 and that the United States must therefore wait until then to obtain its 31% share of the partnership assets.[14] Given the rapid rate at which

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sales were simply part of petitioner's effort to obstruct the grand jury investigation. This evidence is summarized at pages 35-39 of the government's brief in the court of appeals.

[14] This argument was raised for the first time when the government renewed its request that the district court appoint a receiver to manage Cauble Enterprises. The district court had previously declined to appoint a receiver despite petitioner's repeated squandering of the assets of the partnership through reckless speculation in precious metals and interest rate futures and through further gambling in Las Vegas.

the partnership is losing money due to petitioner's mismanagement, it is almost certain that there would be nothing left to divide by that time.

Petitioner also omits mention of the fact that the attorney representing the limited partners is at present engaged in negotiating an agreement with the government that would allow the limited partners gradually to buy out the government's interest in the partnership. That is the practical solution preferred by the limited partners. This explains why the limited partners have not filed a petition for remission or mitigation of the forfeiture with the Attorney General.[15] The government, exercising its statutory responsibility to make "due provision for the rights of innocent persons" (Section 1963(c)), is already making every effort to protect the legitimate interests of the limited partners.

Petitioner's suggestion that the limited partners' due process rights were denied because they did not receive notice of the impending forfeiture is incorrect. The limited partners (petitioner's wife and son) were fully aware of this highly publicized criminal proceeding from the outset.[16] They did not obtain

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[15] Because the limited partners have not filed a petition for remission or mitigation, petitioner's suggestion (Pet. 20) that it is time for this Court to examine the "procedural fairness of this suggested procedure" is clearly premature. In any event, the limited partners have not sought review here, and petitioner has no standing to represent their interests, which are quite different from his.

The change in Department of Justice policy noted by petitioner (Pet. 19 and n.19) does not preclude the limited partners from filing a petition for remission or mitigation because their legal interests in the partnership are not coextensive with the order of forfeiture.

[16] In any event, third parties who may be affected by a judgment of forfeiture are simply not entitled to notice or a hearing prior to the time that the judgment is entered.

counsel or enter an appearance prior to the entry of the judgment of forfeiture or for many months thereafter. Petitioner purported to represent the interests of the limited partners in the courts below and purports to represent their interest here. Petitioner may not have it both ways. If he does represent the limited partners' interests, then they have had their "day in court." If he does not represent their interests, then he has no standing to challenge the forfeiture judgment now on their behalf.

Petitioner also maintains (Pet. 20-21) that the court of appeals' decision is in conflict with this Court's holding in *United States* v. *Rodgers*, No. 81-1476 (May 31, 1983). *Rodgers* was a tax case in which the issue was whether 26 U.S.C. 7403 empowers a federal district court to order the sale of a family home in which a delinquent taxpayer had an interest at the time he incurred his indebtedness, but in which the taxpayer's spouse, who does not owe any of that indebtedness, also has a separate "homestead" right as defined by Texas law. This Court held that the statute does grant power to order the sale, but that its exercise is limited to some degree by equitable discretion. *United States* v. *Rodgers*, *supra*, slip op. 1. This Court therefore reversed the decision of the court of appeals, which had held that "the federal tax lien may not be foreclosed against the homestead property for as long as the nontaxpayer spouse maintains his or her homestead interest under state law." *United States* v. *Rodgers*, 649 F.2d 1117, 1125 (5th Cir. 1981).

In his briefs in the Fifth Circuit, petitioner made no mention of that court's decision in *Rodgers* even though that decision might have lent some colorable support to his argument that, under Texas partnership law, the United States could not take his place

as a partner in Cauble Enterprises. Brief for Appellant Rex C. Cauble at 43-45. Following the affirmance of petitioner's conviction and the judgment of forfeiture, and the issuance of this Court's decision in *Rodgers* reversing the Fifth Circuit (both of which occurred on May 31, 1983), petitioner sought rehearing in the Fifth Circuit. At that time, he argued that the court of appeals' decision in this case was in conflict with this Court's decision in *Rodgers*. The same court of appeals that had decided *Rodgers* adversely to the government denied the rehearing petition without a dissenting vote. There is no reason for this Court to review the issue inasmuch as it was not presented at the proper time in the court of appeals and the court below did not pass upon it. Moreover, as we have already noted, the limited partners and the government are attempting to reach an out-of-court settlement that would protect everyone's legitimate interests in Cauble Enterprises. And the limited partners have not sought review of the decision below.

In any event, petitioner's allegation of a conflict is groundless. It is obvious that the decision in *Rodgers*, which is concerned with the proper application of 26 U.S.C. 7403, has nothing to say about the correct interpretation of 18 U.S.C. 1963, the RICO forfeiture provision. This Court's holding in *Rodgers* that a district court possesses some discretion under 26 U.S.C. 7403 to balance the equities involved in a particular case was based on the fact that Section 7403 provides that a district court "may" decree the sale of property. The Court observed that, under settled principles of statutory construction, the use of the word "may" usually implies some degree of discretion absent indications of contrary legislative intent, which it did not find to be present.

The forfeiture provisions of the RICO statute, by contrast, use the word "shall," and the courts of appeals have consistently held that Congress intended forfeitures under RICO to be mandatory. *United States* v. *L'Hoste*, 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Godoy*, 678 F.2d 84 (9th Cir. 1982); *United States* v. *Hess*, 691 F.2d 188, 190-191 (4th Cir. 1982). Thus, this Court's construction of Section 7403 would clearly not control its construction of Section 1963.

5. Petitioner's final contention (Pet. 21-22) is that the court of appeals erred in upholding his conviction on the four bank misapplication counts despite its statement that *United States* v. *Britton*, 108 U.S. 193, 197 (1883), "may be construed as recognizing a consent defense." The Court need not consider this contention because, even if petitioner's conviction on these four counts were vacated, neither the length of time he will spend in prison nor the scope of the forfeiture judgment would be affected. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

In any event, petitioner's claim that the decision below conflicts wtih *Britton* is without merit. The facts in *Britton* are totally different from those here. *Britton* recognized (108 U.S. at 197) that, in a situation where the discounting of an insolvent bank officer's note was within the discretion of the board of directors of the bank and the board, "knowing the facts, order[ed] it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a wilful misapplication of the funds of the bank, and subject him to a criminal prosecution."

Here, only two of the four loans that formed the basis for the four misapplication counts were "approved" by the banks in any manner. See Pet. App. 51a-52a. Thus, petitioner's argument concerns only two of the four misapplication counts. Even with respect to those two counts, the facts here are readily distinguishable from *Britton* because 1) the banks clearly had no discretion to loan money for the purpose of aiding a marijuana smuggling operation; 2) petitioner did not inform the banks of the true purpose for which the loans were made; and 3) petitioner's control over the banks in question was so great as to preclude their board of directors or loan committee from questioning petitioner's actions. See Pet. 54a n.125.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

DAVID B. SMITH
Attorney

DECEMBER 1983

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